



U.S. Department of Justice
Complaint Adjudication Office

Agency Complaint No. ATF-2011-00751
DJ Number 187-9-149

601 D Street, NW
Patrick Henry Building, Room A4810
Washington, DC 20530

JUL 8 - 2013

DEPARTMENT OF JUSTICE FINAL DECISION

in the case of

Mia M. Macy v. Bureau of Alcohol, Tobacco, Firearms, and
Explosives

On June 13, 2011, complainant Mia Macy, an applicant for a position as a contract Ballistics Forensic Technician in the Forensic Science Laboratory, San Francisco Field Division, Walnut Creek, California, filed an equal employment opportunity complaint against the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Complainant claimed that she was discriminated against based on her sex (gender identity and sex stereotyping) when she was not selected for the position. As background, at the time complainant began the process of applying for the position at issue, she identified as a male, and her name was Charles Demasi. During the time she applied for the position, complainant was in the process of transitioning from male to female. Complainant changed her name to Mia Marie Macy on March 2 or 3, 2011 (Ex. F2 at 1) ^{1,2}.

Procedural History

1. By letter dated October 26, 2011, the ATF EEO Office accepted the following issue for investigation (Ex. C1 at 72):

Whether [complainant] was discriminated against based on [her] gender identity sex (female) stereotyping when on May 5, 2011, [she] learned that [she was] not hired as a contractor for the position of National Integrated

¹"Ex. _" or "Exs. _" refer to exhibits in the record of investigation and their corresponding exhibit and page number(s).

²As noted in the Report of Investigation, some of the events described in the record occurred while complainant was still legally a male and using her former name, Charles Demasi. For consistency, in this decision complainant will be referred to in most instances as female and as Mia Macy.

Ballistic Information Network (NIBIN) Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office.

In the same letter, the ATF Executive Assistant for Equal Opportunity also notified complainant (Ibid):

Since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the Equal Employment Opportunity Commission (EEOC), your claims will be processed according to Department of Justice policy. The claims will be investigated; at the conclusion of the investigation, your gender identity stereotyping claim will be referred directly to the Department of Justice, Complaint Adjudication Office, for issuance of a final agency decision based on the investigative record.³

Through counsel, complainant notified the ATF of her objection to the ATF's characterization of her claim as based on "gender identity stereotyping" (Ex. C2 at 76). Complainant stated that the EEO Counselor's report had similarly inaccurately described complainant's claim as "Sex-change in gender (from male to female)" (Ex. B1 at 8). Complainant stated that she "is a transgender woman who was discriminated against during the hiring process for a job with the ATF" (Ex. C2 at 76). Complainant maintained that the discrimination was based on her sex, sex stereotyping, sex due to gender transition/change of sex, sex due to gender identity, and "to the extent not covered by" these bases, discrimination on the basis of gender identity (Id. at 77).

2. On November 13, 2011, the ATF issued complainant a "Correction to Acceptance" of her complaint (Ex. C4 at 79). The ATF stated the issue accepted for investigation as:

³The Department of Justice approved an internal policy prohibiting discrimination based on gender identity on April 5, 2011. Under the Department policy, complaints of discrimination based on gender identity were to be processed pursuant to the Department's internal EEO Administrative Complaint Process. See HR Order - DOJ 1200.1: Part 4, Equal Employment Opportunity Program, Chapter 4-1, B(2) and Discrimination Complaint Processing System, j. (<http://www.justice.gov/jmd/hr/hrorder/chpt4-1.htm>).

Whether [complainant] was discriminated against based on sex (female) and gender identity stereotyping when on May 5, 2011, [she] learned that [she was] not hired as a contractor for the position of NIBIN Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office.

The ATF informed complainant that her "claim based on sex (female) will be processed under regulations found under Title VII of the Civil Rights Act of 1964, as amended" (Ibid). The ATF advised further that complainant's discrimination claim "based on gender identity stereotyping will not be adjudicated before the EEOC," but "will be processed according to DOJ policy and practice" (Id. at 79-80). This meant that, following the ATF's investigation of complainant's claim, her "gender identity stereotyping claim" would be presented directly to the Complaint Adjudication Office for issuance of a final agency decision (Id. at 80).

3. On December 9, 2011, complainant filed an appeal concerning her complaint to the Equal Employment Opportunity Commission. Complainant contended that the proper claim to be adjudicated was whether she had been discriminated against on the basis of "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" when she was not selected for the NIBIN Ballistics Forensic Technician position. Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives, EEOC Appeal No. 0120120821 (April 20, 2012), 2012 WL 1435995 at 3. Complainant argued that the ATF erred in reclassifying her complaint into two separate claims of discrimination: one based on her sex over which the EEOC had Title VII jurisdiction, and a separate claim based on gender identity stereotyping to which only DOJ policy applied. Complainant maintained that the ATF's characterization her claim amounted to a "de facto dismissal of her Title VII claim of discrimination based on gender identity and transgender status" (Ibid).

The EEOC held that the ATF had "mistakenly separated complainant's complaint into separate claims," and that "[e]ach of the formulations of complainant's claims are simply different ways of stating the same claim of discrimination 'based on... sex,' a claim cognizable under Title VII" (Id. at 5). The EEOC stated that its decision "hereby clarifies that claims of

discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process" (Id. at 4). The EEOC remanded complainant's complaint to the Department of Justice and ordered that the ATF "process the remanded complaint in accordance with 29 C.F.R. § 1614.108 et seq." (Id. at 12).

4. On May 18, 2012, the ATF issued a "Modification of Acceptance Letter" (Ex. C5 at 81). In accordance with the EEOC's decision and instructions, the ATF defined the issue accepted for investigation as follows:

Whether [complainant] was discriminated against based on gender (female), gender identity, gender stereotype, and/or transgender status when on May 5, 2011, [she] learned that [she was] not hired as a contractor for the position of NIBIN Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office.

As relief, complainant seeks unspecified "financial relief" (Ex. F2 at 113). Complainant seeks a position as an ATF Laboratory Technician or NIBIN Technical Specialist in the San Francisco ATF Field Division. Complainant also seeks a "nondiscrimination policy and non-discrimination training to be adopted for the Walnut Creek Laboratory on transgender issues" (Ibid).

5. An investigation of complainant's complaint was conducted from October 26, 2011, until July 23, 2012. This office received the case for adjudication on October 31, 2012. On February 8, 2013, this office received a letter from complainant's counsel requesting that the Department postpone adjudicating complainant's complaint until the investigative record could be supplemented with information gathered during the EEOC's investigation of the ATF contractor, Aspen of D.C., against whom complainant had also filed a discrimination complaint. This office agreed to delay issuing a final decision. When it was apparent the EEOC's investigation was taking quite a long time and that the EEOC's investigation of Aspen of D.C. would not contribute significantly to the record involving the ATF, this office issued the final agency decision.

Factual Background

1. Complainant's Evidence and Statements

A. In December 2010 complainant was working as a detective in the Phoenix Police Department in Phoenix, Arizona. Complainant said that she notified her supervisor, Sergeant Brandon Huntley, that she intended to leave her position and was considering moving to the San Francisco Bay Area. Complainant said that Huntley informed her that "the ATF Walnut Creek Laboratory needed someone to work with NIBIN, a ballistics imagery-matching program" (Ex. F2 at 104). Complainant said that Huntley called Walnut Creek Integrated Ballistics Identification System (IBIS) Section Chief Ronald Nichols and recommended complainant for a NIBIN Laboratory Technician position.

Complainant said that she "never saw an advertised posting for this position" (Ibid). Complainant explained that "NIBIN is a partnership between local law enforcement agencies and the ATF whereby local law enforcement compare digital images of the markings on fired cartridge cases or bullets from crime scenes with those in the NIBIN database" (Ibid). Complainant added that "to obtain the digital images, local law enforcement and the ATF, as administrators of NIBIN, use the program IBIS" (Id. at 104-105). Complainant said that she was one of approximately forty people in the United States "certified by ATF to do IBIS Cartridge Case Acquisition" (Id. at 105). Complainant said that she "had fired guns for casing comparisons, done other ballistics matching, and worked on NIBIN and with the ATF while [she] was a Police Detective in Phoenix" (Ibid). Complainant said that the ATF had also certified her "in casing acquisition and comparison" (Ibid). Complainant said that neither Nichols, nor anyone with the contractor responsible for processing applicants (Aspen of D.C.), told complainant that she "lacked any qualification for the job" (Ibid).

Complainant said that ATF IBIS Section Chief Nichols called her on or about December 17, 2010. Complainant said that Nichols told her that Huntley had "highly recommended" her for the position, and that in light of this recommendation, "the NIBIN Forensics Technician job was [hers], pending the outcome of [her] background check" (Ibid). Complainant said that Nichols "was pleased that [she] was already certified in IBIS,

because this meant [she] could start immediately and did not require training" (Ibid). Complainant said that Nichols told her that "there were three NIBIN lab tech positions he needed to fill, and that they were being filled by a contractor, Aspen of D.C." (Id. at 106). Complainant said she and Nichols "discussed [complainant's] NIBIN and IBIS experience specifically, including 'Brass Tax,' which is a federal contracted shell casing acquisition and comparison equipment and software program" (Ibid). Complainant said that she told Nichols that she "wanted the job" and Nichols responded that ATF personnel in Washington, D.C., would contact her to begin the background investigation (Id. at 105).

Complainant's notes from her conversation with Nichols in their entirety read as follows (Ex. B1 at 64):

- ATF R. Nichols (Telephone number deleted)
- Resume?
- IBIS
- Civilian Contractor working Aspen
- NIBIN
- 3 Contractors
- At-will position
- Benefits \$50,000.00; 27.00 hours

Complainant said that "three days later, Nichols e-mailed [her] and said that he needed [her] resume, full name, and Social Security number," which she provided via e-mail on January 3, 2011 (Ex. F2 at 105; F8a at 185). Complainant stated that at the time, her name, Charles Demasi, was on all the identifying documents she sent Nichols. Complainant said that ATF Personnel Security Assistant Kelsey Numrych subsequently contacted her and instructed her to complete a security form. Complainant said that she submitted the necessary forms to ATF NIBIN Branch Chief Timothy Curtis, initially electronically and then later by mail after Curtis informed her that some of the paperwork was missing. On March 3, 2011, complainant said that she received an e-mail from Numrych informing her that her completed security packet had been received and that a security interview would follow. Complainant said that on March 15, 2011, Robert Hartley, an ATF contract investigator, interviewed her at her house in Phoenix. Complainant said that Hartley told her that he would also be interviewing her neighbors, friends, and former co-workers.

B. On March 28, 2011, complainant received an e-mail from Gwen Henderson, Director of Operations for Aspen of D.C., Inc., the ATF contractor (EX. F12B at 199). Henderson wrote that she "would like to register [complainant] with [Aspen], and the second step would normally be a scheduled Meet and Greet with the Lab Director and his team, but [Henderson had been] told that they [already had] met with [complainant]" (Ibid). Henderson instructed complainant to respond to the e-mail if she remained interested in the position as an IBIS Laboratory Technician. Henderson also indicated that upon hearing a positive response from complainant, she would mail complainant the Aspen of D.C. application packet. Henderson asked that complainant review the company's website and submit two forms of identification.

Complainant responded to Henderson via e-mail on March 29, 2011. Complainant wrote that she was "very interested" in the position and noted that her background investigation had taken longer than she had anticipated (Id. at 201). Complainant informed Henderson that she was moving to the Bay Area that week and provided her new address. Complainant then wrote (Id. at 201-202):

There has been one change, but a big one, that I need to talk to lab director about before I start work. I guess I can just let you know and then give them the opportunity to decide. I am transitioning from male to female. I have been in counseling for almost a year and recently (three weeks ago) underwent feminine facial surgery. I was diagnosed with gender identity disorder and have taken the legal process to change.

This decision took thirty odd years to make and did not come lightly. My life, health, and whole outlook has just been so positive. But with this I have sacrificed friends and family. I am one of the lucky transgendered and have a beautiful loving wife and great friends that have come along for the new ride. With that, I will totally understand if they want to pass on me. I still have a great resume, work ethic, recommendations and can still do the job, just in better shoes. If it is too much, which it is for some, I am just happy I was given the opportunity.

Thank you so much for your time.

Complainant said that on March 30, 2011, Henderson telephoned complainant and "said she had no problem with [complainant] being transgender, and she said that [complainant] could still have a job with Aspen" (Ex. F2 at 108). Complainant said that Henderson also stated that complainant "did not need to tell anyone, that the ATF Laboratory did not need to know [complainant] was transgender" (Ibid). Complainant said that Henderson added, "You work for me. I am the person who pays you" (Ibid). Complainant said that, related to her job search, she did not tell anyone other than Henderson about her name change or gender change.

On March 31, 2011, Henderson responded to complainant's e-mail and informed complainant that she had spoken with the ATF's Contracting Officer's Technical Representative (COTR) Karen Nason "regarding [complainant's] recent name change" (Id. at 201). In the e-mail response, Henderson wrote that Nason wanted complainant "to provide [Nason] the name and telephone number of the person who conducted [complainant's] security investigation" (Ibid). Henderson also wrote that Nason would contact the investigator "directly and provide them with the information that has changed since [complainant's] initial investigation, i.e., name change" (Ibid). Complainant said that she provided the investigator's (Hartley) contact information to Henderson.

Complainant also received an e-mail from Hartley on March 31, 2011. In the e-mail Hartley wrote that he "hoped to finish [complainant's] investigation the first of next week," adding that he would "probably have a few questions" (Id. at 203). Hartley's e-mail did not mention complainant's name or gender change, and the record did not contain any evidence that he was aware of either at the time he sent complainant the e-mail. Complainant e-mailed Henderson the same day and wrote that she "was hoping" that Hartley "did not reveal [gender] change to all of [complainant's co-workers] and out [her]" (Ibid). Complainant also wrote that "[i]f you could ask for discretion it would be very nice" (Ibid). Henderson responded via e-mail the same day that "Hartley does not know the updated information" (Ibid). Complainant said that Hartley contacted her on April 2, 2011, and asked for the names of people he should speak to at the Phoenix Police Department.

Complainant said that on April 3, 2011, she e-mailed Henderson copies of her new driver's license and Social Security card reflecting her name and gender change.

Complainant said that she spoke with Henderson on the telephone on April 3, 2011, and asked when she should report to Walnut Creek and who would inform Nichols that she was now known as Mia Macy. Complainant said that Henderson responded that "she would take care of that" and that Henderson "needed to talk to ATF Walnut Creek staff about where [complainant] would report, and [her] schedule" (Ex. F2 at 109). Complainant said that Henderson told her that she would call complainant back with that information, but Henderson never called her back. Complainant said that she "called [Henderson] numerous times between April 3 and April 8 and left messages, but [Henderson] did not respond" (Ibid).

Complainant said that on April 8, 2011, she received an e-mail from Henderson. The e-mail read as follows (Ex. B1 at 40):

Hello Mia,

I tried reaching you several times this week by your cell phone (number deleted) but I could not leave a message because the line was always busy.

As you know the Federal Government is currently operating under a continuing resolution (CR), which funds all of our government portfolio through April 8, 201[1], if a full budget or CR is not enacted on or before that date, then the government will furlough non-essential employees until funding becomes available. Since the government is working hard to come to some resolutions, our current funding on the majority of our government contracts have [sic] been reduced and some have been discontinued.

In light of this recent situation, my client, ATF, has reduced their current staffing needs on our contract and the position that you applied for in the Walnut Creek, CA Forensic Lab is no longer available due to budget cuts.

If an opportunity in the near future matches your experience, I will contact you for consideration.

I appreciate your full support during the long investigation process as well as these critical times, and I am thankful that you expressed an interest in a career with our team at Aspen of D.C., Inc. If you have any

questions, please do not hesitate to contact me directly via e-mail and/or phone call.

Best regards, Gwen

Complainant said that, contrary to Henderson's assertion, her phone was not always busy. Complainant noted that the phone number Henderson claimed to have dialed "transposed digits from the area code of [complainant's] phone number" (Ex. F2 at 109). Complainant noted that Henderson "did not state that two positions had been reduced to one position," as ATF officials would later state was the justification for not hiring complainant (Ibid). Complainant said that she spoke with Henderson on the telephone after receiving the e-mail and that Henderson told her that, in light of the possible federal government shutdown, Aspen "was lucky to keep the ATF contracted positions that [they] already had" (Id. at 110). Complainant said that Henderson told complainant that she would still like complainant to submit her Aspen employee packet, including her resume, in case any other positions became available. Complainant said that on May 4, 2011, Henderson sent her an e-mail offering complainant the opportunity to apply for a position as Human Resource Benefits Specialist with the U.S. Customs and Border Patrol in Seattle, Washington. Complainant said that she responded that she was not interested in the position as her "background [was] in law enforcement and computer forensics and not in human resources" (Ibid).

C. In the EEO Counseling Report, the Counselor noted that ATF IBIS Section Chief Nichols said that a decision was made to hire only one NIBIN specialist as "it would require too much time on lab personnel to train if two [were] hired" (Ex. B1 at 11). Nichols told the Counselor that "a decision was reached to hire only one with the concurrence of the Lab Chief [Donna Read]" (Ibid). Complainant contended that Nichols' statement regarding the training was "untrue" (Ex. F2 at 110). Complainant said that she had the NIBIN experience required for the Walnut Creek Laboratory Technician position. Complainant said that during her phone interview with Nichols, he had been "very pleased that [complainant] could start immediately at the lab without needing any training other than office orientation" (Id. at 111).

Complainant said that she was "stunned" when she later learned that someone else was hired for a Laboratory Technician

position after complainant had been told that funding for the position had been cut. Complainant said that she did not know who was hired for the position, "but unless the person is one of the few who have been trained on the IBIS Brass Track system and had experience working with NIBIN as [complainant did], the individual would not have been as qualified as [complainant]" (Ibid).

Complainant said that "the circumstances of the position's withdrawal, as well as the reasons for the withdrawal, [did] not add up," and this led her to conclude that she had been discriminated against based on her female transgender identity (Ibid).

2. The ATF Employees' Evidence and Statements

a) ATF Walnut Creek Laboratory Chief Donna Read

ATF Walnut Creek Laboratory Chief Donna Read said that complainant applied for a position as an IBIS contractor. Read said that the lab "requested two of these positions because we had lost two of our original three IBIS contractors" (Ex. 3a at 123). Read said that the ATF's Contracting Officer's Representative (COTR) Karen Nason informed Aspen of D.C. to recruit for two positions.

Read said that the ATF can refer candidates to Aspen for contracted positions, "but they are referred to the COTR and to Aspen of D.C. for the background security check" (Ibid). Read said that background investigations are conducted by the ATF, but they are initiated with the applicant through Aspen of D.C. Read said that "an in-person interview is required for the applicant, and this is a required step in the process" (Ibid). Read added that she had "not agreed to hire anyone before meeting them in person" (Ex. F3b at 129). Read said that for the position at issue, Nichols "would have had primary input on the applicant following the in-person interview," as he is the supervisor for the position and "subject matter expert in firearms" (Ex. F3a at 123). Read said that the ATF Walnut Creek office "notifies Aspen of D.C. of the Meet and Greet interview and if the candidate appears qualified for the position" (Ibid). Read said that she is "then notified by the ATF COTR when the background investigation is successfully completed and the applicant can begin work" (Ibid). Read said that "complainant was never told she would be hired for the position" (Ibid).

Read said that Nichols told Read that "he had spoken to complainant only once, in January 2011, which to [Read's] knowledge was prior to the start of the background investigation" (Ibid).

In the EEO Counseling Report, the Counselor stated that Read said that complainant was not hired for the Laboratory Technician position because funding was available for only one such position, and other funding was going to be used to fill another necessary position at the Walnut Creek facility. The Counselor reported that Read said that she had discussed the situation with Nichols and that they had agreed to hire the "applicant [who] was further along in the background investigation process," and that turned out to be applicant Z [REDACTED] (Ex. B1 at 9).

In her declaration for the EEO investigation, Read said that complainant was not hired for the position "as a result of the ongoing economic crisis and reductions in budgets," which meant that "all supervisors in ATF were expected to exercise due diligence in fiscally managing their offices" (Ibid). Read explained (Id. at 123-124):

Through 2011, managers were continually evaluating many areas to potentially save money and reevaluate which positions were deemed critical. Mid-year, the Government was facing a potential shutdown with impending furloughs and/or lay-offs. During this timeframe, I frequently met with my management team to discuss the budget situation. Around that time, the Quality Assurance contractor tendered her resignation. This was a critical position for the lab. That position was critical to successfully meeting the rigors of an October 2011 accreditation by the American Society of Crime Laboratory Directors. ...During that time-frame, I met with [IBIS Section Chief] Ron Nichols to discuss the budget and to see if there were any areas where we could make cuts to ensure the most critical needs were met. I asked Ron Nichols if the two pending IBIS contractor positions could be considered, and could the workload of the section get by with one. In the event that funding was only available for the two contractor positions, I needed to ensure one of them was now for the Quality Assurance position, a position we had not expected to be vacated. Ron Nichols told me he could manage with one IBIS contractor, and it would not pose a negative

impact on his section. He mentioned it had been a lot of work to try to train several people all at once, so he saw a benefit in proceeding to hire one IBIS contractor. Ron also agreed that the Quality position was critical, as opposed to the IBIS contractor position, which was not. When I asked Ron Nichols for the status of the two candidates, Ron said that complainant had not called him back since their initial discussion in January, and [he] did not know if [complainant] had ever relocated or was still interested in the position. Ron also indicated the last status update as the background investigations was that [complainant] was in the early stages of the background process while the other candidate, [REDACTED] Z [REDACTED], was much further along to adjudication. I do not recall when this discussion took place exactly, but it was during the timeframe of a possible government shutdown. Ron Nichols also mentioned that Z [REDACTED] had already visited the lab and had been interviewed.

The record evidence showed that Z [REDACTED] was selected and hired for the contract Laboratory Technician position.

Read explained further that "the economic crisis and discussions of budget cuts have been ongoing for the past couple of years," and that "the budget is typically a topic at management meetings and all supervisors were expected to do more with less and manage their resources in the most fiscally responsible manner" (Id. at 125). Read reiterated that while she "had originally submitted a request to replace two IBIS contractor positions," the resignation of the Quality Assurance contractor meant that "this office needed to ensure that critical position was backfilled" (Ibid).

The EEO investigator requested that the ATF produce any written communications between Nichols and Read pertaining to the decision to hire only one IBIS Laboratory Technician in April 2011. Responding for Read, via e-mail to the EEO investigator, ATF EEO Manager/Mediator Larry Sovinsky wrote that "Read stated that... no such written communication exists" (Ex. F9 at 190). Asked by the EEO investigator for documentation indicating that funding for only one IBIS Laboratory Technician was available, Sovinsky wrote, "Read stated that this was an internal management decision based on the possibility of an impending government shutdown; No such documentation exists" (Ibid). Read said that she had "no recollection of the actual

date" of her discussion with Nichols about hiring one IBIS contractor and a Quality Assurance contractor rather than two IBIS contractors (Ex. F7a at 126).

Read said that "Nichols did not mention how much training complainant would need compared to [Z██████████]" (Ex. F3 at 125). Read added that this issue was "not germane because the training time issue was not why [she] decided to hire only one contractor, or why Nichols decided that the contractor hired would be Z██████████" (Ibid). Regarding the determination of which candidate was further along in the background investigation process, Read said that "Nichols would have received a status update from either NIBIN Branch Chief Timothy Curtis or ATF COTR Karen Nason" (Id. at 126).

In a supplemental declaration, Read stated that "the decision not to bring two IBIS contractors on at the same time was two-fold: budget and training" (Ex. F3b at 129). Read added that she has "not agreed to hire anyone before meeting them in person" (Ibid).

In a second supplemental questionnaire, the EEO investigator asked Read the following question (Ex. F3c at 131):

When did you learn funding was only available for two positions? Furnish the date or the approximate date if you do not know the exact date (emphasis in original).

Read responded: "There is no specific date to provide. I have previously stated that a requirement of my position is management of the overall budget of the laboratory. This is an integral part of my job function and is performed on a daily basis. Unlimited contractor positions are never at my availability. In this case, I was provided two contractor positions and had to ensure the laboratory's critical needs were met for both" (Ibid).

The EEO investigator also asked:

If hiring two contractors rather than three was a decision you made without specific management direction, when did you make that decision? Furnish the date or the approximate date if you do not know the exact date (emphasis in original).

Read responded: "I had two contractor positions to fill, not three. Unfortunately during that timeframe I had lost my Quality Assurance contractor, and it was imperative that I fill that position immediately as this facility was facing a major decision to utilize the two contractor positions I had by filling one with an IBIS technician and the other [with] a Quality Assurance contractor. Of the two IBIS applicants, Z[REDACTED] and [complainant], I had no knowledge or preference towards either candidate. Z[REDACTED]'s name was put forward by [Nichols] solely on the basis that [Z[REDACTED]]'s background was already in adjudication. I would have been just as happy to hire [complainant]" (Ibid).

Read said that complainant's gender change was not a factor in the decision to hire one rather than two IBIS technicians. Read said that she did not "remember an exact date that [she] learned of [complainant's] gender identity and gender status change" (Ex. F3 at 122). Read said that she would have learned this information from Karen Nason, the COTR, "subsequent to Nason terminating the background investigation" (Ibid).

The record contained a copy of an e-mail Read sent to Nason on April 5, 2011. The e-mail stated (Ex. F12a at 196):

Hi Karen,

I left you a voice message. When you have a moment would you give me a call.

Thanks, Donna

The EEO investigator did not ask Read about this e-mail, and Read did not offer any testimony relating to it.

Read said that "[t]he only reason Z[REDACTED] was hired over complainant was because he was already in the adjudication process of his background investigation, and complainant was not" (Ex. F3d at 133). The EEO investigator asked Read (Ex. F3a at 126):

If a decision was made to hire the candidate who was farthest along in the background check process, how did you learn which candidate was farthest along in the background check process?

Read responded: "Ron Nichols would have received a status update from either NIBIN Branch Chief Timothy Curtis or ATF COTR Karen Nason" (Ibid).

The record evidence showed that the EEO investigator requested that the ATF produce "documents pertaining to dates of background clearances of referred candidates and dates referred candidates submitted all required information" (Ex. F9 at 189). Responding for Read via e-mail to the EEO investigator, ATF EEO Manager/Mediator Sovinsky wrote, "Read stated that the ATF Lab is not privy to those documents. Applicants send their information directly through Aspen. The ATF COTR periodically checks on their status" (Ibid). The EEO investigator also requested that the ATF produce "documentation of status of background clearances for complainant and for other selectee on April 8, 2011" (Id. at 190). Responding for Read, Sovinsky wrote, "Read stated that the lab would not have received this documentation" (Ibid).

Read said that Nichols had told her that he had interviewed Z [REDACTED] at the Walnut Creek facility. The visitors log showed that on December 17, 2010, Z [REDACTED] signed in at 12:55 p.m. and signed out at 1:16 p.m. (Ex. F11 at 192). Read said that she "was informed that complainant had prior IBIS experience, and we would have been just as happy to hire [complainant]" (Ex. F3d at 133-134).

Read added that the IBIS Laboratory Technician position had subsequently "been offered several times to complainant, long before this EEO [complaint] began" (Id. at 134). Read said that complainant should have been offered the position in August and/or September 2011. Read also said (Ibid):

As soon as it became feasible to bring on a third contractor, I made the IBIS contractor position available to complainant. I have continued to do so on multiple occasions. I have the privilege to work in a very nice office among very nice people. Complainant's gender transition would not have even been a topic for discussion or concern.

There was no evidence in the record showing that complainant was re-offered the position or that any such offer occurred before complainant initiated the EEO process. Complainant contacted an EEO Counselor about her concerns on May

10, 2011 (Ex. B1 at 8). As of that date, there was no record evidence that Read or anyone else from the ATF or Aspen of D.C. had offered complainant a position at Walnut Creek after Henderson sent complainant the e-mail on April 8, 2011, informing complainant that there was no position available for her due to budget cuts. The record evidence showed that on January 24, 2012, ATF COTR Nason sent Aspen of D.C. an e-mail stating that if complainant was still available for the IBIS Laboratory Technician position, ATF would like to re-initiate the background investigation (Ex. F22 at 379). On January 30, 2012, Aspen sent complainant an e-mail inquiring whether she was still interested in the position (Id. at 387).

b) ATF Walnut Creek IBIS Section Chief Ronald Nichols

ATF IBIS Section Chief Ronald Nichols said that complainant's supervisor at the Phoenix Police Department contacted him and told him that complainant was moving to the Bay Area. Nichols said that he called complainant "and discussed complainant's qualifications" for the IBIS Laboratory Technician position (Ex. F4a at 137). Nichols did not specify when either of these telephone calls occurred. Nichols said that "this IBIS position required familiarity with computer systems, firearms, and comfort level with firing firearms" (Id. at 137). Nichols said that he told complainant that there were vacancies at Walnut Creek and asked complainant to send him a resume. Nichols said that he told complainant to contact him after she moved to the Bay Area because Nichols would need "to arrange for a face-to-face interview" (Id. at 138). Nichols said that he also told complainant "it was helpful that [s]he had worked with IBIS" (Ibid). Nichols said that he did not recall speaking with complainant again, but did receive an e-mail from her with her resume. Nichols said that he sent complainant's resume to either ATF NIBIN Branch Chief Timothy Curtis or Nason. Nichols added that a personal meeting with candidates was a standard part of the selection process.

Nichols said that "[b]efore April 2011, COTR Nason called [him] and told [him] there was confusion about the name of someone we were looking to hire as an IBIS contractor" (Ex. F4a at 136). Nichols said that he "assumed it was Z [REDACTED], ...because [Nichols] knew [Z [REDACTED]] had been born on a military base outside the United States" (Ibid). Nichols said that he told Nason "to contact Z [REDACTED] about the matter" (Ibid).

Nichols said that "[i]n April 2011, [he] was asked by Donna Read if [he] could do without one IBIS contractor" (Ibid). Nichols said that he told Read that he could. Nichols said that Read told him "she was concerned about upcoming budget issues and asked if [Nichols] would be content with filling only one of the IBIS contracting positions because our Quality Assurance contractor was leaving and we needed to fill [that] position" (Id. at 139). Nichols said that Walnut Creek was "going through a re-accreditation process... and so [Read] considered it to be a priority that the Quality Assurance contract position be filled" (Ibid). Nichols said that he told Read that he "could be content with one IBIS contractor instead of two, but [he did] not recall any further discussion with her about it" (Ibid). Nichols said that "the final decision was Read's" (Ibid). Nichols said that Read "asked [him] to pick one of the two IBIS applicants for the IBIS contract position" (Ibid). Nichols said that he "had already met with Z [REDACTED], and... had not heard back from complainant, so [he] told [Read] we should hire Z [REDACTED]" (Ibid).

In the EEO Counseling Report, the EEO Counselor noted that Nichols said that "it would require too much time on lab personnel to train two [Laboratory Technicians]," so he and Read agreed to hire only one (Ex. B1 at 11). In his declaration for the EEO investigation, Nichols said that the time that it would take to train two Laboratory Technicians as opposed to one "was part of the consideration, but not the primary factor" in the decision to hire only one (Ex. F4a at 139).

The EEO Counselor also reported that Nichols attributed the decision to hire Z [REDACTED] to the fact that complainant "was not as far along in the [background] investigation process [as Z [REDACTED]]; thus, [complainant] was the one that was eliminated" (Ex. B1 at 11). For the EEO investigation, Nichols was asked (Ex. F4a at 139):

If a decision was made to hire the candidate who was farthest along in the background check process, how did you learn which candidate was farthest along in the background check process?

Nichols responded: "This was not a consideration for me because I was not aware of what was going on there. Z [REDACTED] had made it clear that he was interested in the position, and since I had already met with Z [REDACTED] and I had not heard back

from complainant, I told Read we should hire Z [REDACTED] if we were going to fill only one position" (Ibid).

Nichols added that Read "told [him] of budget concerns for staffing..., but did not provide any more information than that" (Ibid). Nichols said that he did "not know the details, when the funding issue became a concern, apart from the pending government shut-down publicized through nationwide news, nor any other budget issues" (Ibid). In a supplemental declaration, Nichols said that he did "not know when Read told [him] of her concerns about budget issues, but it was on or about the same time when there was a suggestion on nationwide news that there could be a government shut down" (Ex. F4b at 145).

Nichols added that even though complainant had experience, she "would still need training" (Ex. F4a at 140). Nichols said that all new employees went through the "entire training program," which "can take from a few months to one year, depending on their experience and comfort with firearms" (Ibid). Nichols explained that "the certification that complainant had was not from ATF; it was from the manufacturer of the equipment" (Ibid). Nichols said that "Z [REDACTED] did not have that certification from the manufacturer, but it was not required for hire" (Ibid). Nichols said that "Z [REDACTED] had demonstrated ability with computer systems, so [Nichols] knew he would do well with the IBIS Cartridge Case Acquisition" (Ibid). Nichols said that Z [REDACTED] did not start working at Walnut Creek until July 2011. Nichols said that he thought that there was an issue with Z [REDACTED]'s credit statement, and that it took some time before it was "cleared up for the background check" (Ibid). Nichols said that complainant was not told that she would be hired pending a background check.

Nichols denied that complainant was discriminated against based on her sex, gender identity, or transgender status with respect to the selection for the Laboratory Technician position. Nichols also said that complainant's gender transition was not a factor in the decision to hire one, rather than two Laboratory Technicians. Nichols said that he learned of complainant's name and gender change during a phone call from COTR Nason in April 2011, after his conversation with Read, when "Nason asked [Nichols] if [he] was aware of [complainant] having [a] gender change, and [Nichols] said [he] was not" (Ibid). In his conversation with the EEO Counselor in May 2011, Nichols said

that he "had no knowledge of [complainant] having changed [her] name to Mia" (Ex. B1 at 11).

c) ATF NIBIN Branch Chief Timothy Curtis

ATF NIBIN Branch Chief Timothy Curtis said that there were two vacant contractor positions at the Walnut Creek Laboratory in January 2011. Curtis said that Nichols gave him the relevant information about complainant and Z [REDACTED] to submit for background investigations. Curtis said that he did not learn of complainant's transgender status until "after asking to have the background investigation stopped, approximately, April 5, 2011" (Ex. F5a at 147).

Curtis said that "the decision to hire one IBIS contractor rather than two was made on April 5, 2011, when [he] was on the phone with [Walnut Creek Lab Chief] Donna Read" (Id. at 148). Curtis said that on April 5, 2011, Read called him "and advised that bringing on two IBIS technicians on at the same time was hard on Ron Nichols and the training process; At this time, they would like only to bring on one of the two technicians they had in background; Read asked that we stop the background on the complainant" (id. at 148). Curtis said that "although the government was under a continuing resolution and receiving funding incrementally, [he did] not believe funding was the issue for this decision" (Ibid). Curtis said that he recalled "that the decision was based on the difficulty of training multiple people at the same time" (Ibid). The EEO Counselor noted in the Counseling Report that "Curtis stated he was informed by Nichols that he [Nichols] could only train one individual" (Ex. B1 at 11). Curtis said that after his conversation with Read, he instructed COTR Nason to stop the background investigation of complainant. The record contained an e-mail from Curtis to Nason dated April 5, 2011, stating, "Tell Aspen to cancel Demasi hire for SF IBIS Tech, also notify OPRSO to stop [complainant's background investigation]. This is what [Read] called for, no need to call her back" (Ex. 12a at 195).

In his declaration, Curtis added that "funding that was not used to bring on the complainant remained on the contract for other expenses" (Ex. F5a at 148). The EEO investigator asked Curtis if he had informed Read in 2011 that she should cut back on staff positions, including contract staff. Curtis said that he did "not recall discussing [with Read] the cutting back on

staff or contract staff" (Ibid). Curtis said that "there were discussions of not bringing on additional contract staff under the Aspen contract due to a funding ceiling on the contract which could not be exceeded" (Ibid). Curtis added that he "was not sure when this conversation took place" (Id. at 150). Asked by the EEO investigator to furnish any documentation to corroborate his testimony, Curtis responded that he "could not locate an e-mail from Read informing [him] that the Walnut Creek ATF Laboratory wanted to hire one IBIS contractor and one Quality Assurance contractor rather than two IBIS contractors" (Id. at 151).

As with Nichols, the EEO investigator asked Curtis (Id. at 148):

If a decision was made to hire the IBIS contract candidate who was farthest along in the background check process, how did you learn which candidate was farthest along in the background check process?

Curtis responded: "[Z████████] had checked in with me several times in March to inquire on the status of [Z████████]'s background] investigation. On March 21, 2011, I was notified by OPRSO that a waiver for [complainant's background investigation] was not approved, so the complete investigation would need to be conducted" (Ibid).

Curtis said that, to his knowledge, complainant's sex, gender identity, or transgender status were not factors with respect to the decision not to select complainant for the Laboratory Technician position.

d) NIBIN Branch Program Analyst Karen Nason

NIBIN Branch Program Analyst Karen Nason said that she "took over the Aspen [Contracting Officer's Technical Representative] COTR duties during March 2011" (Ex. F6a at 155). Nason said that "at the time [she] assumed the role of COTR for the contract, there were three contract IBIS Tech positions assigned to Walnut Creek" (Ibid). Nason said that she "did not provide any guidance to Read" during 2011 that Read should cut back on staff positions, including contract positions (Id. at 156). Nason also said that she did not tell Read that there might not be enough funding for the Quality Assurance contractor position. Nason said that when she assumed the COTR role, one

of the IBIS Laboratory Technician positions had been filled, and complainant and Z█████i were in the process of having their background investigations completed for the remaining two vacancies. Nason said that Z█████ turned in his paperwork for his background investigation approximately one month before complainant. Nason said that she "learned this based on a review of the dates on the paperwork that was submitted to [the ATF] Personnel Security Branch (PSB)" (Ibid). Nason said that "waivers had been requested for both potential contractors and denied for both" (Ibid).

Concerning the decision to terminate complainant's hiring process, Nason said that she understood that her supervisor, Curtis, received a phone call from Read on April 5, 2011, requesting that ATF terminate the background investigation process on complainant. Nason said that she "was then directed via e-mail (from Curtis) to stop the background process" (Id. at 156). Nason said that she then sent an e-mail to the PSB and to Aspen directing them to stop complainant's background investigation. The record contained a copy of the e-mail Nason sent to the PSB Contractor Team on April 5, 2011, providing "notification to stop the background process for a request for clearance for... Charles Demasi (name change to Mia Marie Macy)" (Ex. F17b at 276). Nason said that she was "not aware of funding being the reason for stopping the background process" (Ex. F6a at 156).

As part of the EEO Counselor's initial inquiry, Nason responded via e-mail to the Counselor's questions. Asked what was the basis for the decision to stop complainant's background investigation, Nason wrote (Ex. B1 at 32):

The Walnut Creek Laboratory notified Curtis and myself that bringing on two IBIS Lab Techs at the same time placed too much of a burden/time constraint on the lab personnel responsible for training the new hires. Therefore, the Walnut Creek Laboratory determined that the need at that time was for one additional contract IBIS/Lab Tech rather than two.

Nason said that she learned of complainant's name change in an e-mail on April 5, 2011, from Aspen of D.C. (Ex. F6a at 155) Nason said that she believed "a potential gender change may have been brought up in a April 6, 2011, conversation with [Aspen]" (Ibid). In a supplemental questionnaire, the EEO investigator

asked Nason when she contacted ATF officials to notify them of complainant's gender transition. Nason responded "N/A" (Ex. F6c at 162). The EEO investigator asked Nason if she had any discussion by telephone, e-mail, or otherwise with officials at ATF regarding complainant's gender transition. Nason responded that she was "an ATF employee," and cited her previous response to the investigator's question of when she learned of complainant's name: April 5, 2011, via the e-mail from Aspen of D.C. (Ibid).

In another supplemental questionnaire, the EEO investigator asked Nason to describe in detail the conversation she had with the Aspen of D.C. on April 6, 2011, as it pertained to complainant. Nason responded that "there was not a detailed conversation pertaining to the complainant; Just acknowledgment they received the April 5, 2011 e-mail, and I believe a comment in passing, and we moved to the other contract issues" (Ex. F6b at 160). The EEO investigator also asked Nason if she informed Read that complainant's name had changed from Charles Demasi to Mia Macy. Nason responded that she did "not have any records of informing Read of the name change" (id. at 157). Nason said that "[b]ased on [her] review of the e-mails from that day, [she] did not talk to [Read] that day until after the guidance was received to stop the background process" (Ibid). Asked if she had informed Nichols of complainant's name change, Nason responded that she did "not have any records of informing Nichols of the name change" (Ibid).

Nason added that "based on the information [she] received at the time regarding the decision to stop the background process," she did not think that complainant's sex, gender identity, or transgender status were factors with respect to the decision not to select complainant for the Laboratory Technician position (Id. at 158).

In a third declaration for the EEO investigation, Nason said that "based on the pending EEO complaint, the IBIS Laboratory Technician position is being held vacant" (Ex. F6c at 163). Nason added that "[t]he job was re-offered to the complainant by the vendor during the January 2012 timeframe" (Ibid).

e) Aspen of D.C. Director of Operations Gwen Henderson

Aspen of D.C. Director of Operations Gwen Henderson explained the process that contractors hired for the Walnut Creek Laboratory complete. Henderson said that "[a]ll candidates at all locations were scheduled for pre-selection telephone interviews; completed phase I of [Aspen of D.C.] application process; ...then scheduled for a Meet and Greet with the lab chiefs at each location; then selected candidates were taken to the next step to complete the personal suitability and security paperwork; as well as take fingerprints and provide two color photos" (Ex. 7b at 168-169). Henderson said that she informed complainant in an e-mail "on March 28, 2011, that ATF was interested in having [her] be considered for this position based upon [her] pre-screening telephone interview session with Ron Nichols" (id. at 169).

Henderson said that on March 29, 2011, she learned of complainant's name and gender change when complainant responded to Henderson's e-mail inquiring whether complainant remained interested in the IBIS Laboratory Technician position (See, supra pp. 6-7). Henderson said after receiving complainant's e-mail, she then contacted Nason and "told her that Charles Demasi had some information changes that needed to be given to the investigator conducting [complainant's] investigation, and that the investigator needed to contact [complainant] for the updated information" (id. at 165). In a supplemental declaration, Henderson specified that she called Nason on March 31, 2011, and told Nason that Nason needed to contact the person conducting complainant's background investigation "because [complainant] wanted to provide some updated information not shared [with the investigator] during [the] initial investigation process" (Ex. F7b at 168). Henderson said that Nason instructed her "to send this request in an e-mail to [Nason] with the investigator's name" (Ibid).

The record contained a copy of the e-mail Henderson sent to complainant on March 31, 2011. Henderson wrote, "I spoke with my COTR at ATF regarding your recent name change, and she would like you to provide the name and number of the person who performed your security investigation" (Id. at 201). Henderson wrote further in that e-mail that Nason would contact the investigator "directly and provide them with the information that has changed since [complainant's] initial investigation,

i.e., name change" (Ibid). On March 31, 2011, Nason also sent Henderson an e-mail stating (Ex. F12a at 193):

Gwen,

The other item you mentioned was the additional information to be forwarded for the background clearance. Please send this ASAP so we can get the updated information to PSB.

Thanks,
KN

Also on March 31, 2011, Henderson replied to Nason via e-mail, stating that she was waiting for a reply from "the candidate," presumably complainant, and that she would forward the updated information to Nason and Curtis as soon as she received it (Ex. 12a at 193). The record evidence showed that on April 3, 2011, complainant sent Henderson an e-mail with copies of her new driver's license and Social Security card reflecting her name change from Charles Demasi to Mia Marie Macy (Ex. F8b at 187). Henderson said that she sent Nason the following e-mail on April 5, 2011 (Ex. 12a at 194):

Hello Karen,

Per my conversation to you on 03/31/2011 regarding a name change for Charles Demasi effective 03/18/2011 and the investigator who is processing his security, please see below:

Old Information
Charles Demasi
(address deleted)

New Information
Mia Marie Macy
(address deleted)

The security investigator is Robert.Hartley@usdoj.gov.

If you have any questions, please do not hesitate to contact me directly.

Thanks,
Gwen Henderson

Henderson said that she did not have any discussion by telephone, e-mail, or otherwise with officials at ATF regarding complainant's gender transition (Ex. F7b at 168).

Henderson said that "the main reason" a decision was made not to hire complainant "was funding which reduced the staff requirements from two IBIS Lab Technicians to one IBIS Lab Technician and one Quality Assurance Technician" (Ex. F7a at 164). Henderson said that she learned of the funding issue via a letter pre-dated April 8, 2011, from ATF Contracting Officer Amanda Boshears (Ex. F20 at 377). The letter was an attachment to an e-mail Boshears sent Henderson on April 7, 2011, explaining that the "letter provides the current status of the [contract between Aspen of D.C. and the ATF]" (Id. at 376). The e-mail stated that the letter "will be in effect should the Government be in a Shutdown Status as of midnight April 8, 2011" (Ibid). Boshears informed Henderson that the "ATF considers [Aspen's] services essential to its operations and you are requested to continue to provide services under the subject task order and the task order numbers listed in the attachment" (Id. at 377). Boshears further stated that upon enactment of a budget or continuing resolution, Aspen would be paid retroactively for its services. Boshears also noted, "If the above referenced contract(s) has been fully funded, please continue to perform services and submit invoices in accordance with the terms of the contract" (Ibid). Henderson did not specify whether the Walnut Creek IBIS Laboratory Technician positions were funded. The ATF contract with Aspen of D.C. indicated that four Laboratory Technician positions were budgeted for Walnut Creek for the period of March 26, 2011, through March 25, 2012 (Ex. F15a at 245).

Henderson sent complainant an e-mail on April 8, 2011, informing complainant that the IBIS Laboratory Technician position was no longer available "due to budget cuts" (See, supra pp. 8-9).

Henderson said that "Z [REDACTED] was recommended to start prior to [complainant] because [Read] stated that [Z [REDACTED]'s] security investigation was completed, and [complainant's] security process was still pending investigation, and secondly, since the budget freeze, the current requirement of staff changed to one IBIS [Laboratory Technician] and one Quality Assurance personnel" (Ex. F7a at 166). Henderson did not say when she heard or received the communication from Read indicating that Z [REDACTED]'s security investigation had been completed. Henderson said that she "remembered being told that [complainant] did go through a pre-selection telephone interview

conducted by Ron Nichols and that this was done in early January [2011]" (Ibid). Henderson said that complainant's sex, gender identity, or transgender status were not factors with respect to the decision not to select complainant for the Laboratory Technician position.

3. Additional Evidence

a) Forensic Laboratory Technician Position

The ATF contract with Aspen of D.C. stated that contractors hired for the Forensics Laboratory Technician positions will be responsible for performing tasks such as laboratory tests; setting up and adjusting laboratory apparatus; operating grinders, agitators, centrifuges, ovens, condensers, and vibrating screens; recording test results and writing test reports; and processing, screening, and tracking all incoming scientific materials (Ex. F15a at 225).

Complainant testified that as a Police Detective, she was an experienced user of the National Integrated Ballistic Information Network (NIBIN) platform and certified in the use of the Integrated Ballistic Identification Systems (IBIS) program. Complainant's responses to the Questionnaire for Public Trust Positions (SF 85P) indicated that she had worked as a Police Detective with the Phoenix, Arizona, Police Department from 1998 until the time she applied for the Laboratory Technician position (Es. F17a at 263). Complainant also served in the U.S. Army from 1990 to 1993 (Id. at 267).

Z[REDACTED]'s resume indicated that he was an Information Technology Director, who had worked from 2008 to 2010 as a Project Manager/Consultant in San Francisco, California (Ex. F16 at 251). Z[REDACTED] summarized his experience as follows (Ibid):

Experienced IT Director with over fifteen years of professional experience as a leader in multiple technology domains, including software engineering best practices, server administration, data center migrations, and full product lifecycle project management. Demonstrated skills in organizational development, product development, strategic planning, resource management, and team mentoring.

b) Background Investigations

The record showed that ATF Personnel Security Assistant Kelsey Numrych of the Personnel Security Branch Contractor Team sent NIBIN Branch Chief Curtis an e-mail on March 3, 2011, informing him that complainant's personnel security package was received on February 24, 2011, and that the background investigation would now begin (Ex. F17e at 328). The ATF requested a waiver of the background investigation sometime in March 2011 (Ex. F17e at 325). The waiver request was denied on March 17, 2011 (Ibid).

Investigator Robert Hartley stated in his report that he began complainant's background investigation on March 9, 2011 (Ex. F17d at 278). The report referred to complainant as Charles Demasi. Hartley completed complainant's background investigation report on April 5, 2011. In the report synopsis, Hartley wrote: "Unless otherwise indicated, all sources interviewed or contacted were favorable" (Ibid). Under the employment section, Hartley noted that "the record did not contain any derogatory information" (Ibid). Hartley also stated that complainant was two months delinquent on her home mortgage payments, but complainant had told him that she had applied for a loan modification. Hartley stated that complainant explained that her home had lost considerable value during the recession, and if the loan modification failed, she would proceed to attempt a short sale of the property.

ATF PSB Special Investigator Peter Reilly approved the report on April 6, 2011 (Ibid). While the record evidence showed that the ATF approved complainant's background investigation on April 6, 2011, the record evidence also indicated that there was another phase, the adjudication phase, of the background clearance process (Ex. F14 at 211).

The record showed that the ATF opened Z[REDACTED]'s background investigation on January 31, 2011 (Ex. F18a at 365). The ATF requested a waiver of Z[REDACTED]'s background investigation sometime in February 2011 (Ex. F18c at 371). The waiver request was denied on February 10, 2011 (Id. at 372). The record evidence showed that Z[REDACTED]'s background investigation began in January and the investigatory phase proceeded through at least March 15, 2011 (Ex. F18a at 366-368). The record appeared to indicate that the investigation was then turned over for adjudication. An adjudicator, PSB Special Investigator Ralph

Blevins initially signed and dated on April 29, 2011, a form indicating that various official background checks had been requested and completed. In the notes/comments section, Blevins noted that a "subsequent tax check" had been requested on or about May 2, 2011 (Id. at 367).

The record also contained a copy of the adjudicator's worksheet for Z[REDACTED]'s background investigation that Blevins completed on June 17, 2011 (Ex. F18b at 370). Blevins noted some conducts/incidents for Z[REDACTED] (Ibid):

1995 - Criminal or Dishonest Conduct - Assault and Battery

2006 - Misconduct or Negligence - Harassment

June 2011 - Criminal or Dishonest Conduct - Financial - Delinquent IRS debt

May 2011 - Criminal or Dishonest Conduct - Financial - Collection for Chase

May 2011 - Criminal or Dishonest Conduct - Financial - for Citi

Blevins noted that Z[REDACTED] had a delinquent debt with the IRS, but was in a repayment plan. Blevins also noted "past delinquent debts have been settled" (Ibid). Blevins noted further an "old assault and battery charge about 1995 and one allegation of harassment in the workplace which [Z[REDACTED]] was cleared of" (Ibid). Blevins concluded, "Final issue code is a 'D'," which indicated that there was a "significant issue" with the background clearance (Ibid). However, Blevins also noted the mitigating factors mentioned above, i.e., that Z[REDACTED] had "settled two debts and is in a repayment plan for the IRS delinquent debt" (Ibid). On another form related to the background investigation, Blevins stated that the issues in Z[REDACTED]'s background investigation were "misconduct, criminal, financial," and indicated with a check mark that these issues were "not significant" (Ex. F18a at 365). Blevins recommended approval of Z[REDACTED]'s background investigation on June 17, 2011, and the ATF approved the background investigation on June 20, 2011 (Exs. F18b at 370; F18a at 368). The record noted July 1, 2011, as the start date for Z[REDACTED] at the Walnut Creek laboratory (Ex. F19 at 374).

c) The Quality Assurance Position

The record contained a chart showing the Aspen of DC contractors who worked at Walnut Creek, including the start and end dates of the contractors (Ex. F22 at 390). With regard to the Administrative Assistant/Quality Assurance contractor, Emily Schum worked in this position from April 26, 2010, until October 9, 2011. Schum worked part-time from May 2011 until October 9, 2011. An e-mail from Nason to Read on June 17, 2011, indicated that a search for Schum's replacement was continuing (Ex. F21 at 378). Stacie Fenn began working in the Quality Assurance position on September 19, 2011 (Ex. F22 at 390).

d) Congressional Budget Deal

On April 7, 2011, the United States Congress reached a preliminary budget deal to provide continued funding for government operations for six months.

Analysis

Complainant claimed that she was discriminated against based on her sex, gender identity, gender stereotype, and/or transgender status when the ATF did not hire her for the position of NIBIN Ballistics Forensic Technician (Laboratory Technician) in the Walnut Creek Lab, San Francisco Field Division. Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16, prohibits a federal employer from discriminating against an employee based on sex. The EEOC has held that "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition." Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives, EEOC Appeal No. 0120120821 (April 20, 2012), 2012 WL 1435995 at 4.

I. Complainant Was Qualified for the Job of IBIS Laboratory Technician, and Her Application Was Processed Until April 5, 2011

The record establishes that the ATF was seeking, at least initially, to hire two people for positions as NIBIN Ballistics Forensic Technicians (Laboratory Technicians) in the Walnut Creek Lab, San Francisco Field Division. The record evidence showed that complainant applied for and initially was deemed

qualified for one of the Laboratory Technician positions. Complainant was one of two applicants ATF officials provisionally referred to its contractor, Aspen of D.C. The ATF required that both of the candidates it referred, complainant and Paul Z [REDACTED], successfully complete background investigations before they could begin working at the facility. The ATF, through contracted personnel, was responsible for the background investigation.

The record evidence established that complainant's application process proceeded in typical fashion until April 5, 2011. Complainant timely submitted all necessary paperwork to ATF officials and to Aspen. The ATF conducted a background investigation and completed the investigatory phase of it on April 5, 2011.

On March 29, 2011, just prior to the completion of the background investigation, complainant sent an e-mail to Aspen Director of Operations Gwen Henderson. In the e-mail, in addition to telling Henderson that she remained interested in the Laboratory Technician position, complainant also said that she was going through the process of "transitioning from male to female." Complainant testified that on March 30, 2011, Henderson telephoned her and informed her that her transgender status was not a problem and that Aspen would continue its hiring process. After some further e-mail exchanges, which are discussed further below, on April 8, 2011, Henderson sent complainant an e-mail informing her that the position complainant "applied for in the Walnut Creek, CA Forensic Lab [was] no longer available due to budget cuts." The record evidence showed that the ATF then proceeded to continue processing the application of Z [REDACTED], who began working as a Laboratory Technician at Walnut Creek on July 1, 2011.

II. The ATF Proffered Legitimate, Nondiscriminatory Reasons for the Decision Not to Hire Complainant for the Laboratory Technician Position

In response to complainant's claim that she was discriminated against based on her sex, gender identity, gender stereotype, and/or transgender status, the ATF proffered legitimate, albeit in part a bit conflicting, nondiscriminatory reasons for its actions.

A. The record evidence established that ATF Walnut Creek Laboratory Chief Donna Read was responsible for the decision to terminate complainant's employment application process. Read told the EEO Counselor that complainant was not hired for the Laboratory Technician position because funding was available for only two contractor positions, and one of those positions, the Quality Assurance contractor, was critical to Walnut Creek's operations, especially in light of an upcoming accreditation process for the laboratory. Read also told the EEO Counselor that she and ATF IBIS Section Chief Ronald Nichols discussed the situation and agreed to hire the candidate who was further along in the background investigation process.

In her declaration for the EEO investigation, Read testified that complainant was not hired for the position "as a result of the ongoing economic crisis and reductions in budgets." Read elaborated on her discussion with Nichols and said that she asked him, in light of the budget situation and the critical need to hire a Quality Assurance contractor, if he could operate his section with one Laboratory Technician. Read testified that Nichols assured her that having only one Laboratory Technician "would not pose a negative impact on his section." Read testified that Nichols advised that "it had been a lot of work to try to train several people all at once," and thus there was some benefit to hiring only one Laboratory Technician. Read testified that she also asked Nichols about the status of the two candidates. Read testified that Nichols told her that he had already met Z [REDACTED], and the last status update he had on the background investigations indicated that Z [REDACTED] "was much further along to adjudication." Read testified that Nichols also told her that he had not spoken to complainant since January 2011, and did not know whether she had relocated to the Bay Area and whether she was still interested in the position.

Read testified further that Nichols did not discuss how much training complainant would need, compared to Z [REDACTED], adding that "this issue was not germane because the training time issue was not why [Read] decided to hire only one contractor." However, in a supplemental declaration, Read testified that "the decision not to bring two IBIS contractors on at the same time was two-fold: budget and training." Read summarized her testimony stating, "The only reason Z [REDACTED] was hired over complainant was because he was already in the

adjudication process of his background investigation, and complainant was not."

B. ATF IBIS Section Chief Nichols corroborated, to some extent, Read's testimony about their discussion concerning hiring only one Laboratory Technician. Nichols testified that Read mentioned "budget concerns" in their conversation, but other than his general knowledge of the pending possible government shutdown, he did not know "when the funding issue became a concern." Nichols testified that Read considered the Quality Assurance contractor position critical because of the accreditation process Walnut Creek was to complete later in the year. Nichols acknowledged that he told Read that he could manage his section with the hire of only one Laboratory Technician.

Nichols testified that the time required to train two Laboratory Technicians, as opposed to one, "was part of the consideration, but not the primary factor" in the decision to hire only one person. The EEO Counselor's Report noted that Nichols said that "it would require too much time on lab personnel to train two" Laboratory Technicians. Nichols testified that the final decision was Read's, but she asked him to pick one of the two candidates. Nichols testified that he told Read that because he had already met with Z [REDACTED], and because he had not heard from complainant since his initial conversation with her, Read should hire Z [REDACTED].

C. ATF NIBIN Branch Chief Curtis testified that Read offered a different reason to him for hiring only one Laboratory Technician. Curtis testified that Read telephoned him on April 5, 2011, and told him that she wanted to stop complainant's background check. Curtis said that Read explained that "bringing on two IBIS technicians at the same time was hard on Ron Nichols and the training process," and that Read and Nichols wanted "to bring on only one of the two candidates." Curtis testified that he did "not recall discussing [with Read] the cutting back on staff or contract staff" and he did "not believe funding was the issue for the decision." Curtis testified that the decision to hire only one Laboratory Technician "was based on the difficulty of training multiple people at the same time." As noted above, Curtis told the EEO Counselor that Nichols had informed him that he could train only one individual. Curtis testified that he told COTR Nason to stop complainant's

background investigation after he spoke with Read on April 5, 2011.

D. NIBIN Branch Program Analyst and COTR Karen Nason testified that she was "not aware of funding being the reason for stopping" complainant's background investigation.

Thus, the record established that ATF management officials proffered legitimate, nondiscriminatory reasons for the decision not to hire complainant. In summary, Read said budget concerns led Read to decide that they could afford to bring onboard only two contractors, one Laboratory Technician, and a contractor for the Quality Assurance position that Read deemed critical. Read and Nichols also considered the burden that training two Laboratory Technicians would present for IBIS Section Chief Nichols. Nichols recommended that they hire Z [REDACTED] because Nichols had already met with Z [REDACTED], and Nichols had not spoken with complainant since their initial conversation. Finally, Read testified that Z [REDACTED] was selected only because his background investigation was in the adjudication phase and further along than complainant's.

III. The Record Shows that Complainant's Transgender Status Played an Impermissible Part in the Selection Process

Because the ATF proffered legitimate, nondiscriminatory reasons for the alleged discriminatory event, the record must be assessed to determine whether the ATF's stated reasons were pretextual. Shapiro v. Social Security Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Pretext may be shown either directly, by showing that a discriminatory reason more likely motivated the employer, or indirectly, "by showing that the employer's proffered explanation is unworthy of credence." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). The ultimate question to be decided here is whether the ATF considered complainant's transgender status when deciding whom to hire. For the reasons discussed below, this office finds that the ATF's proffered reasons for its decision to stop complainant's application process based on Z [REDACTED] being further along in the process were not credible, and therefore those reasons represented pretext for discrimination.

For this discussion, the following timeline of relevant events and communications between the principals, produced from

record evidence, including e-mails, documents, and testimony, is provided for reference:

| | |
|------------------------------------|--|
| December 17, 2010 (On or about) | - Complainant speaks with ATF Section Chief Nichols about the Laboratory Technician Position |
| December 17, 2010 | - Nichols interviews Z [REDACTED] at Walnut Creek facility |
| January 31, 2011 | - ATF begins background investigation of Z [REDACTED] |
| March 9, 2011 | - ATF begins background investigation of complainant |
| March 28, 2011 | - Aspen Director of Operations Henderson sends complainant an e-mail inquiring whether she remains interested in the position |
| March 29, 2011 | - Complainant e-mails Henderson that she is interested in the position and informs her of her transition from male to female |
| March 30, 2011 | - Henderson telephones complainant and says that her transgender status is not a problem |
| March 31, 2011 | - Henderson calls ATF COTR Karen Nason and explains that complainant wanted to provide some updated information not shared with the background investigator, and according to Henderson, that complainant had changed her name |
| March 31, 2011 7:20 A.M. | - Henderson e-mails complainant and advises that she has spoken to ATF COTR Nason about complainant's name change and that Nason wants complainant to provide her the name and telephone number of the person responsible for complainant's background investigation |
| March 31, 2011 10:17 A.M. | - Nason e-mails Henderson requesting that Henderson forward the "additional |

| | |
|------------------------------|--|
| | information... ASAP" |
| March 31, 2011 10:23 A.M. | - Henderson replies to Nason's e-mail that she will forward the information as soon as possible to Nason and ATF NIBIN Branch Chief Timothy Curtis |
| April 3, 2011 | - Complainant e-mails Henderson copies of her new driver's license and Social Security card reflecting her name and gender change |
| April 3, 2011 | - Complainant telephones Henderson about a start date at Walnut Creek; Henderson advises that she will get back to complainant with that information |
| April 5, 2011 2:01 P.M. | - Henderson sends Nason an e-mail with complainant's new name, Mia Macy, and complainant's new address; Henderson also provides the background investigator, Robert Hartley's, contact information |
| April 5, 2011 3:18 P.M. | - ATF Walnut Creek Laboratory Chief Donna Read sends Nason an e-mail stating that she left Nason a voicemail asking that Nason call her |
| April 5, 2011 3:53 P.M. | - Nason e-mails NIBIN Branch Chief Curtis saying, "See--it probably was Aspen." |
| April 5, 2011 3:59 P.M. | - Curtis e-mails Nason stating, "Tell Aspen to cancel Demasi hire for SF IBIS Tech, also notify OPRSO to stop his [background investigation]. This is what [Read] called for, no need to call her back." |
| April 5, 2011 | - ATF contract investigator Robert Hartley completes complainant's background investigation |
| April 5, 2011 6:26 P.M. | - Nason e-mails PSB Contractor Team and notifies them to stop the background investigation "for Charles Demasi (Name change to Mia Macy)" |

| | |
|---------------|---|
| April 6, 2011 | - ATF PSB Personnel Special Investigator Peter Reilly approves complainant's background investigation report |
| April 6, 2011 | - Nason speaks with Aspen of D.C.; acknowledges that complainant's "potential gender change may have been brought up" |
| April 7, 2011 | - ATF Contracting Officer Amanda Boshears sends Aspen Director of Operations Henderson an e-mail with an attached letter advising of the Government's and Aspen's contract responsibilities in the event of a government shutdown |
| April 7, 2011 | - Congress reaches a budget deal, thus averting a government shutdown |
| April 8, 2011 | - Henderson sends complainant an e-mail notifying her that the Laboratory Technician position at Walnut Creek is "no longer available due to budget cuts" |

A. The Record Fails to Support ATF's Claim that the Hiring Decision Was Based Solely on Which Candidate Was Further Along in the Background Investigation Process

1. ATF Walnut Creek Laboratory Chief Read testified "[t]he only reason Z [REDACTED] was hired over complainant was because he was already in the adjudication process of his background investigation, and complainant was not" (Ex. F3d at 133). Read also testified that, prior to reaching a decision about which candidate to hire, funding concerns led her to discuss with Nichols the idea of hiring only one Laboratory Technician instead of two, and to use remaining funds to hire a Quality Assurance contractor, a position Read deemed more critical because of an upcoming accreditation process. While Read's desire to hire a Quality Assurance contractor was understandable and reasonable, the record contained inconsistencies relating to this proffered rationale for hiring only one Laboratory Technician, particularly the timing of the notice to Read that she needed to hire a Quality Assurance contractor.

Read testified that she had "no recollection of the actual date" of her discussion with Nichols about hiring one IBIS contractor and a Quality Assurance contractor rather than two IBIS contractors. The EEO investigator requested that the ATF produce any documentation that would corroborate Read's testimony as to the timing of her conversation with Nichols. Read's response was that "no such written communication exists." Concerning documentation that might have indicated that funding was available for only one Laboratory Technician because of the need for a Quality Assurance contractor, Read also responded "no such documentation exists." In supplemental interrogatories, the EEO investigator asked Read specifically to provide the "date, or approximate date," when she learned that funding was available for only two positions, one being the Laboratory Technician, the other the Quality Assurance contractor position. Read responded: "there is no specific date to provide." Nichols testified that he recalled his conversation with Read occurred "in April," but he, too, could not provide a specific date. Both Curtis and Nason testified that they did not have any conversations with Read concerning cutting back on staff or contractor positions.

Thus, the record suggests that Read alone determined that there was a funding and/or training problem that affected the number of Laboratory Technicians she could hire. Yet, there was no evidence indicating that Read or any other ATF official, prior to Read's conversation with Nichols sometime in early April 2011, had expressed any concerns about hiring two Laboratory Technicians, how the hiring of two would affect the ATF's ability to hire for the Quality Assurance contractor position, or even the need to hire a new Quality Assurance contractor. More specifically, there was no record evidence that Read had discussions with any other ATF officials concerning funding issues for the Laboratory Technician positions prior to April 5, 2011, the purported date when the ATF first learned of complainant's gender change via the e-mail from Aspen of D.C. Again, it should be noted that Henderson's e-mail to complainant on March 31, 2011, indicated that Henderson had spoken to Nason earlier that day "regarding [complainant's] recent name change," suggesting that Nason was aware of the name change as of March 31, 2011.

The fact that Read felt that her office greatly needed a Quality Assurance contractor is reasonable. Yet, in her testimony, Read did not specify when the Quality Assurance

contractor tendered her resignation or indicated to Read her intent to do so. The record evidence mentioned only one person working as a Quality Assurance contractor during the relevant timeframe, Emily Schum, who, according to the record, worked at Walnut Creek as a Quality Assurance contractor from April 26, 2010, until October 9, 2011. Schum worked part-time from May 2011 until October 9, 2011. The record did not contain any evidence, documentary or testimonial, that anyone other than Schum was working as a Quality Assurance contractor during this time period. The record also did not contain any evidence as to when Schum tendered her resignation, or if and when she gave notice of her intent to do so. An e-mail from Nason to Read on June 17, 2011, indicated that a search, presumably for Schum's eventual replacement, was continuing.

2. Having thoroughly examined the record, this office is not able to determine the validity of Read's purported rationale for hiring only one Laboratory Technician. The remaining analysis focuses on the evidence relating to the background investigation and the decision on the part of ATF officials to stop complainant's application process during the background investigation phase. As discussed further below, the scenario set out in the record fails to support the ATF's claim that Z [REDACTED] was hired only because he was further along in the background investigation process.

a. Read testified that she and Nichols agreed to hire the candidate who was furthest along in the background investigation process for the Laboratory Technician position once they realized they could hire only one. Read testified that when she asked Nichols about the status of the two candidates in April, Nichols told her that he had not spoken to complainant since a conversation with her in January 2011, and did not know whether complainant was still interested in the position or whether she had moved to the Bay Area. Read testified that Nichols also said that he already had met Z [REDACTED] in December 2010. Read testified further that Nichols would have received a status report on the background investigations from either NIBIN Branch Chief Timothy Curtis or ATF COTR Karen Nason.

ATF IBIS Section Chief Nichols' testimony about his conversation with Read largely corroborated Read's testimony, but differed in critical respect with regard to the discussion regarding the status of the candidates' background investigations. In his testimony, Nichols did not say that his

conversation with Read specifically addressed the status of the background investigations. In the EEO Counseling report, the Counselor stated that Nichols attributed the decision to hire Z [REDACTED] to the fact that complainant "was not as far along in the [background] investigation process [as Z [REDACTED]]." However, Nichols' testimony for the EEO investigation contradicted his statement to the EEO Counselor. The EEO investigator asked Nichols specifically: "If a decision was made to hire the candidate who was farthest along in the background check process, how did you learn which candidate was farthest along in the background check process?" Nichols responded: "This was not a consideration for me because I was not aware of what was going on there." Nichols did not mention receiving any update on the status of the background investigations of Z [REDACTED] and complainant from either Curtis or Nason, as Read said he would have.

In response to the EEO investigator's e-mail request for documents relating to the status of the background investigations, Read, through ATF EEO Manager/Mediator Larry Sovinsky, responded that "the lab would not have received this documentation." There was no record evidence establishing that either Read or Nichols checked on or knew the status of the candidates' background investigations at the time Read told ATF NIBIN Branch Chief Curtis to stop complainant's background investigation.

ATF NIBIN Branch Chief Curtis testified that on April 5, 2011, Read telephoned him "and advised that bringing on two IBIS technicians on at the same time was hard on Ron Nichols and the training process; At this time, they would like only to bring on one of the two technicians they had in background; Read asked that we stop the background on the complainant." In his testimony, Curtis did not say that he and Read discussed the status of complainant's or Z [REDACTED]'s background investigations; instead, Curtis testified that Read told him only that complainant's application process should be stopped. Curtis's testimony was clear that Read specified that complainant's background investigation was to be stopped.

The EEO investigator asked Curtis how he learned which candidate was farthest along in the background check process. Curtis responded only that Z [REDACTED] "had checked in with [him] several times in March to inquire on the status of his [background] investigation" and that Curtis was aware that a

background waiver request for complainant had been denied on or about March 20, 2011. The record evidence showed that on February 10, 2011, a similar denial of a waiver request had been issued in regard to Z██████'s background investigation (Ex. F18c at 372). Also, there was nothing in the record to suggest that the fact that a candidate called to check on the status of his background investigation bore any relation to the actual status of the investigation. Indeed, Curtis' testimony, and more specifically his response to the EEO investigator's direct question, did not indicate that at any time Curtis actually inquired about the status of either complainant's or Z██████'s investigations to the PSB Contractor team assigned to conduct the background investigations, or knew who was further along.

ATF COTR Nason testified that Z██████ had submitted his completed paperwork approximately one month before complainant. Nason acknowledged that she learned this information after reviewing the paperwork submitted to the PSB. Nason's testimony suggested that she reviewed this information for the preparation of her declaration for the EEO complaint investigation, but that she had not been involved in making any determination as to which candidate's background investigation was nearest completion when the candidates' applications were being processed. Nason's testimony did not indicate that, prior to Read's instruction to stop complainant's background investigation, Nason had inquired, or been asked to inquire, about the status of complainant's or Z██████'s background investigations and which was further along.

Thus, the record does not contain any evidence to show that on April 5, 2011, the date Read instructed Curtis to stop complainant's background investigation, Read or any other testifying ATF official knew Z██████'s background investigation was in the adjudication process. The record does not state that anyone from ATF had even inquired about the actual progress and status of either candidate's background investigation. Had any of the relevant ATF officials contacted the PSB Contractor team, they would have learned that the investigatory phase of complainant's background investigation was nearly completed as of March 31, 2011, and that the assigned contract investigator actually completed it on April 5, 2011, the same day Read instructed that it be stopped. As of April 6, 2011, the ATF had completed and approved at least the investigatory phase of complainant's background investigation.

The record indicates that there are separate phases of any background investigation, and that Z██████'s background investigation most likely had been passed on to the adjudication phase on or around March 15, 2011. So, the difference was minimal. Yet, the record did not contain any evidence that Read knew this or that anyone from the PSB Contracting team had informed her of such. Moreover, and importantly, as PSB Special Investigator Ralph Blevins noted, there were some issues with Z██████'s background investigation that required more consideration, while complainant had none.

b. As noted above, the record established that ATF Walnut Creek Laboratory Chief Read was responsible for the decision to terminate complainant's employment application process. Read testified that she did "not remember an exact date that [she] learned of complainant's gender identity and gender status change," adding that she would have learned this information from Nason, "subsequent to Nason terminating the background investigation," which occurred on April 5, 2011. It is critical to put Read's actions on April 5, 2011, in the context of the record evidence.

The record showed that complainant first informed Aspen of her gender change via an e-mail to Aspen Director of Operations Henderson on March 29, 2011. Henderson telephoned ATF COTR Nason on March 31, 2011, and told Nason that complainant "wanted to provide some updated information not shared [with the investigator] during the initial investigation process." Although in her declaration for the investigation of this complaint Henderson did not say that she told Nason about complainant's name change, Henderson sent complainant an e-mail the following day stating, "I spoke with my COTR at ATF regarding your recent name change." It is difficult to assume that a gender transition was not even mentioned to Nason.

On April 3, 2011, complainant provided Henderson copies of her new driver's license and Social Security card reflecting her name change from Charles Demasi to Mia Marie Macy. On April 5, 2011, at 2:01 p.m., Henderson e-mailed Nason, informing her of complainant's name change from Charles Demasi to Mia Marie Macy. Nason testified that this was the first time that she had learned of complainant's name change. Nason did not offer any testimony indicating that she shared this information with any other ATF officials at that time. A little over one hour later, at 3:18 p.m. EST, ATF Walnut Creek Laboratory Chief Read e-

mailed Nason stating, "I left you a voice message. When you have a moment would you give me a call." Read did not provide any testimony concerning this e-mail to Nason, which, given the surrounding evidence and circumstances, appeared rather cryptic. ATF NIBIN Branch Chief Curtis testified that Read called him on April 5, 2011, and asked that complainant's background investigation be stopped. Curtis did not specify when he received Read's telephone call. At 3:53 p.m., Nason e-mailed Curtis stating, "See--it probably was Aspen." Curtis responded at 3:59 p.m.: "Tell Aspen to cancel Demasi hire for SF IBIS Tech, also notify OPRSO to stop his [background investigation]. This is what [Read] called for, no need to call her back." At 6:26 p.m., Nason e-mailed the PSB Contractor Team and informed them to stop complainant's background investigation.

The real problem in this scenario is how ATF officials said they decided to stop complainant's background investigation because Z [REDACTED] was further along, and therefore could be hired more quickly. Indeed, the decision to stop complainant's background investigation and hire Z [REDACTED] was so cursory as to suggest other factors were considered. An examination of complainant's and Z [REDACTED]'s qualifications as well as the findings in their respective background investigations lends credence to this view. The record left no doubt that complainant was qualified for the Laboratory Technician position as evidenced by the fact that the ATF deemed her initially qualified and began to take steps to re-offer her the position in January 2012. Nichols testified that the Laboratory Technician position "required familiarity with computer systems, firearms, and comfort level with firing firearms." The record showed that complainant previously had served in the military and had more than twelve years of experience as a Police Detective. Complainant had the requisite experience with firearms. Complainant testified that through her years of police work she was familiar with the NIBIN platform and was a certified user of the IBIS program used by the ATF Forensics Services Laboratory at Walnut Creek. Complainant's experience and knowledge was directly applicable to the Laboratory Technician position.

Z [REDACTED]'s background was in information technology and did not include any prior law enforcement- or lab-related work. There was no evidence in the record that Z [REDACTED] had any prior experience with firearms or previous knowledge of NIBIN or IBIS. Nichols testified that the IBIS certification was not a

prerequisite for the position and that he believed Z█████'s experience with computer systems would prove beneficial when he received training on the IBIS Cartridge Case Acquisition system. Still, in light of complainant's years of directly applicable experience, the record evidence provided sufficient basis to conclude that complainant was at least as well qualified, and very likely better qualified, than Z█████ for the position.

Nothing in the record suggested that ATF officials responsible for the decisions at issue in this case saw the background investigations of either candidate before deciding to stop processing complainant's application and hire Z█████. Still, if one accepts the ATF's claim that funding would allow it to hire only one Laboratory Technician, one would also think the ATF would have shown some concern about what the background investigations of the respective candidates were uncovering in order to ensure selection of the most appropriate candidate. There was, after all, no evidence that a hiring decision had to be made on April 5. Yet, the record shows that none of the relevant ATF officials made any sort of inquiry regarding the background investigations before Read directed that complainant's background investigation be stopped.

Another issue with the ATF's decision to stop complainant's background investigation concerned the apparent haste with which Read made the decision. Although there was a possible government shutdown looming just a few days ahead, the record did not contain any evidence either that the hiring process for a Laboratory Technician could be completed before a shutdown, or that once a shutdown ended the ATF would not be able to proceed with hiring one Laboratory Technician. In other words, it did not seem at all necessary for Read to make such a summary decision without engaging in some inquiry into the actual status of the candidates' background investigations or about their qualifications for the position. Instead, it appears that the ATF's position is that Read unilaterally, and very hastily, decided to not to hire complainant, and this happened on the very day that ATF found out on that complainant, formerly known as Charles Demasi, was now known as Mia Marie Macy. ATF argues that the two actions--stopping the background check and finding out that Mr. Demasi was now Ms. Macy--were totally unrelated.

This case presents facts very much like some in the case of Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008). In Schroer, a tentative job offer was made to an individual who, at

the time the offer was made, was physically male. The plaintiff met an individual from the federal agency that had extended the offer, and told the person that he was in the process of transitioning into becoming physically female, and would be appearing as a woman once hired. The agency subsequently, and very quickly, revoked the job offer. One of the reasons on which the agency relied was a statement by personnel in the office that revoked the offer that the agency assumed that the individual, once she became physically female, would have to undergo a new security clearance, despite the fact that the plaintiff already had one, and the new security process would significantly delay the process of bringing the plaintiff into the office. The district court, rejecting that justification, stated that despite the fact that the agency said that it was relying on the assumption that a new and lengthy security review would be necessary, no one in the agency actually checked to see if a new security review would be necessary, and checking to see if one would be necessary was not a difficult action for the agency to take. The court therefore found that explanation not credible. Similarly here, the fact that no one actually checked to see who was ahead in the application process, despite the fact that checking would have been quite simple, raises questions about the credibility of that explanation.

For the reasons stated above, the record fails to support the ATF's claim that it based the Laboratory Technician hiring decision solely on which candidate was further along in the background investigation process. The record strongly suggests that other factors, to include complainant's transgender status and thus her sex, motivated ATF officials to stop complainant's background investigation process.

B. The Record Contains Additional Inconsistencies
that Undermine the ATF's Proffered Nondiscriminatory
Reasons for its Actions

Summarizing ATF officials' testimonies, Read made the decision to hire one Laboratory Technician and one Quality Assurance contractor on an unspecified date in April 2011, but before she or any of them had knowledge of complainant's gender change. There was testimony that one reason for hiring only one Laboratory Technician was that training two people would place an unwelcome burden on Nichols and the operation of his section. However, testimony relating to this issue was also inconsistent. Read testified that in addition to the funding issue and the

resignation of the Quality Assurance contractor, she and Nichols discussed the training issue and the burden of training multiple people. Curtis testified that this was the rationale Read presented to him for hiring only one Laboratory Technician. Yet, there was no evidence that the burden of training multiple people at the same time had ever been raised as an issue prior to Read's conversation with Nichols in early April. There was also no evidence that this concern had ever previously been used as a justification for hiring only one Laboratory Technician at a time. While Read cited the training concern as justification for her decision to Curtis, Nichols testified that the training issue "was part of the consideration, but not the primary factor" in the decision to hire only one Laboratory Technician.

In her testimony, Read downplayed the role that the training issue played in her decision, at least with regard to the amount of training that either complainant or Z [REDACTED] would require. Read testified that "Nichols did not mention how much training complainant would need compared to [Z [REDACTED]]," adding that this issue was "not germane because the training time issue was not why [she] decided to hire only one contractor, or why Nichols decided that the contractor hired would be Z [REDACTED]." Yet, if the overall training burden were a consideration, it would seem logical that ATF officials would examine which candidate likely would require less training before making a hiring decision. Given complainant's background as a Police Detective, her familiarity with firearms, her experience with the NIBIN platform, and her IBIS certification, there was a very strong case to be made that complainant would require less training than Z [REDACTED], whose background was in information technology and demonstrated no previous experience with firearms, NIBIN, or IBIS. Despite Read's contention that the training burden was a factor in her decision, there was no evidence in the record that she considered the candidates' qualifications or how their qualifications might affect the amount of training required.

Given the timing of the relevant events in this case, it is difficult not to be skeptical of the ATF's version of events. For example, Nason's testimony that she did not learn of complainant's name change until Henderson sent her an e-mail on April 5, 2011, was contradicted by the e-mail that Henderson sent to complainant on March 31, 2011, indicating that Henderson had spoken to Nason about complainant's name change. In addition, Nason's responses to the EEO investigator's questions

of whether she informed Read or Nichols about complainant's name change were ambiguous. Nason did not offer an emphatic or direct "No," to the questions, but stated instead that she "[did] not have any records of informing" Read or Nichols about it. Nichols testified that Nason did inform him of complainant's gender change, specifying only that Nason informed him after he had his discussion with Read about hiring only one Laboratory Technician. But again, neither Read nor Nichols specified when in April they had this discussion. With these vague and conflicting testimonies as the backdrop, the record evidence nevertheless was clear that there was a flurry of activity--discussions, telephone calls, and e-mails--on the part of relevant ATF officials on April 5, 2011.

The record evidence was clear that the timing of Read's decision to hire only one Laboratory Technician occurred in very close proximity to the time--perhaps on the same day--that the ATF received confirmation that complainant had changed her name from Charles Demasi to Mia Marie Macy. The record evidence strongly suggests that at least one ATF official, Nason, knew of complainant's name change on March 31, 2011. There was no doubt that Nason knew about the name change on April 5, 2011. There was nothing in the record to suggest that Read or any other ATF officials had expressed concerns about funding for the Laboratory Technician positions or the burden of training two technicians prior to April 2011. There was also nothing in the record evidence indicating that Read or any other ATF officials actually checked on the status of the candidates' background investigations before Read directed Curtis to stop complainant's background investigation on April 5, 2011.

The timing of complainant's submission of information indicating her gender change and Read's decisions establishes the necessary nexus to show that complainant's transgender status was a factor in Read's, and thus the ATF's, actions. See Peterson v. Department of Justice, EEOC Appeal No. 07A60040 (May 24, 2006), (accepting the Administrative Judge's finding of pretext for illegal retaliation where management official's proffered reasons for delay in submitting QSI paperwork on behalf of complainant were "evasive," not credible, and failed to specify many key dates). In light of these factors, particularly Read's decisions to hire only one Laboratory Technician and to stop complainant's background investigation, this office does not accept the ATF's proffered reasons as the sole legitimate, nondiscriminatory bases for its actions.

Rejection of the employer's proffered reason permits the trier of fact to "infer the ultimate fact of intentional discrimination." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993). Put simply, after considering the evidence, the ATF's version of events that ultimately led Read to her decision to stop complainant's background investigation was not supported by the record. The record showed that complainant's transgender status, and thus her sex, played an impermissible part in the selection process for the Laboratory Technician position at issue.

The finding of Title VII discrimination based on ATF's apparent consideration of complainant's transgender status is not a simple one to make. Notably, at the time of the incident at issue here, essentially between March 30 and April 5, 2011, ATF management officials were not aware that taking employment actions based on the fact that an individual was male or female after a transgender transition was legally impermissible. At that time, the Department of Justice had not yet changed its internal regulations to prohibit employment actions based on transgender status, and the EEOC had not yet held that such action violated Title VII's ban on discrimination on the basis of sex. It may have been that ATF officials were taken aback by the sudden and clearly unexpected announcement that the applicant they knew as Charles DeMasi was now Mia Macy. That does not, however, in any way condone or excuse the actions taken here, which are now a violation of Title VII.

In its decision in this case, the EEOC held that "intentional discrimination against a transgender individual because that person is transgender, is, by definition, discrimination 'based on... sex,' and such discrimination therefore violates Title VII." Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives, EEOC Appeal No. 0120120821 (April 20, 2012), 2012 WL 1435995 at 11. This was, admittedly, a new interpretation of Title VII, as federal courts before that had held that employment conduct based solely on the fact that an individual was transgender was not discrimination on the basis of sex and therefore not prohibited by Title VII. See, e.g., Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984), Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007). The EEOC in Macy held that because the terms "sex" and "gender" are essentially interchangeable, employment actions based on the fact that an individual became physically male or female through a transgender transition is action based on the

person's sex. "When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.'" Macy, at 7, citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2004). Therefore, the EEOC's 2012 decision that discrimination based on transgender status violates Title VII must be applied to the facts in this case.

The issue before this office was whether the ATF discriminated against complainant based on her gender, gender identity, gender stereotype, and/or transgender status when it discontinued processing her application for the Laboratory Technician position. The record established that the ATF intended and began taking steps to hire complainant for the position--until she disclosed that she was transitioning from a man to a woman. The ATF stopped complainant's hiring process when it learned that complainant, formerly Charles Demasi, would become Mia Macy. In light of the EEOC's decision in this case to hold that actions based on transgender status are actions based on sex and therefore covered by Title VII, the ATF's actions were discrimination based on sex and therefore prohibited by Title VII.

Decision and Relief

For the foregoing reasons, this office finds that the ATF discriminated against complainant based on her transgender status, and thus her sex, when it stopped complainant's further participation in the hiring process for the NIBIN Ballistics Forensic Technician Laboratory Technician position. Because this office finds that the ATF discriminated against complainant under Title VII of the Civil Rights Act of 1964, the following relief is ordered:

1. Within 60 days of the date of this decision, ATF shall offer complainant the position of NIBIN Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Division. Complainant shall be given 15 days from the receipt of the offer to either accept or decline the offer. Failure to accept the offer within the 15-day period shall be considered a declination of the offer, unless complainant can show that circumstances beyond her control prevented her from responding within the time limit.

2. The ATF is directed to award complainant back pay, with interest, and other benefits pursuant to 29 C.F.R. §1614.501. Back pay and benefits shall be calculated from April 20, 2011, which is two weeks after the date the ATF completed complainant's background investigation report, up to January 30, 2012, the date Aspen of D.C. sent complainant an e-mail inquiring whether she was still interested in the NIBIN Ballistics Forensic Technician position, as the position had been "re-opened" (Ex. F22 at 387). The record did not contain a response from complainant to Aspen of D.C.'s inquiry. Complainant may present evidence as to why she believes the eligibility period for back pay should be extended beyond the date cited above. If the ATF concludes that complainant would not have entered on duty until a later date, it should provide documentation supporting its conclusion. The ATF shall determine the appropriate amount of back pay, interest, and other benefits due complainant, pursuant to 29 C.F.R. §1614.501(b), within sixty days of the date complainant either accepts or declines an offer of employment. Complainant shall cooperate with the ATF's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the ATF. If there is a dispute regarding the exact amount of back pay and/or benefits, the ATF shall issue a check to complainant for the undisputed amount and complainant may petition this office for enforcement or clarification of the amount in dispute.

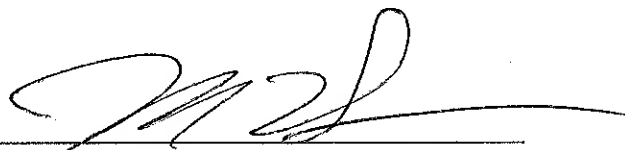
3. The ATF shall take appropriate corrective action to prevent any discrimination from occurring at the ATF Walnut Creek Laboratory, San Francisco Field Division in Walnut Creek, California, consistent with 29 C.F.R. § 1614.501(a)(2).

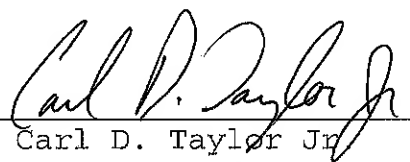
4. As the prevailing party in this matter, complainant may be eligible for compensatory damages pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. §1981a. Complainant will be eligible for compensatory damages if she can demonstrate that she suffered injuries as a direct result of the discrimination found to have occurred in this decision. The ATF shall attempt to determine from complainant, using statements from complainant and others who may have witnessed any emotional or other harm complainant suffered from the discrimination, including medical evidence, an appropriate award for any emotional harm suffered as a result of the sex discrimination in this case. In the event the parties are unable to agree upon an

appropriate compensatory damages award, they should notify this office so that an appropriate award may be determined.

5. As the prevailing party in this case, complainant is also entitled to an award of reasonable attorney's fees pursuant to 29 C.F.R. §1614.501(e). If complainant employed the services of an attorney for this case, her attorney should provide the ATF with a verified statement of costs and an affidavit itemizing the charges for work on those aspects of the case on which the complainant prevailed. Other supporting documentation should also be submitted at this time. In the event the parties are unable to agree upon a reasonable attorney's fee award, they should notify this office so that an appropriate award may be determined.

6. Within thirty days of the date of this decision, the ATF shall post a Notice within the ATF Walnut Creek Lab, San Francisco Field Division, consistent with the requirements of 29 C.F.R. §1614.501(a).



Mark L. Gross
Complaint Adjudication Officer

Carl D. Taylor Jr.
Attorney
Complaint Adjudication Office